

LEE RESOURCES MANAGEMENT CORP.

IBLA 79-198

Decided September 24, 1980

Appeal from decision of the California State Office, Bureau of Land Management, rejecting notices of mining claim locations as untimely filed.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Location--Mining Claims: Recordation

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the dates of location of the claims, failing which the claims are properly declared abandoned and void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment-Mining Claims: Location--Mining Claims: Recordation--Words and Phrases

"Date of Location." The date of location of mining claims is determined in accordance with the law of the State where the claims are situated. Under California law, the time for recordation in the county is measured from the date of the posting of the location notice on the claims.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Location--Mining Claims: Recordation

The dates of location of mining claims as shown on the notices of location recorded in compliance with State law will be

treated as controlling where, after rejection by BLM of the location notices as untimely filed, claimant alleges that the notices are untrue as the dates shown are "typographical errors."

APPEARANCES: Melvin J. Fisher, General Manager, Lee Resources Corp.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

This is an appeal from a decision of the California State Office, Bureau of Land Management (BLM), refusing to accept for filing the location notices for White Jubilee placer mining claims Nos. 9 through 15 because they were not timely filed under 43 U.S.C. § 1744 (1976) and 43 CFR 3833.1-2(b) (1977).

BLM found that appellant's claims were located on September 16 and 17, 1978, based upon the dates entered on the filed certificates of location specifying when the claims were located. Because appellant's certificates of location were not filed with BLM until January 11, 1979, more than 90 days later, the certificates were returned to appellant.

Appellant alleges that the recorded and filed location notices contain typographical errors; the claims were actually located October 14 through 17, 1978. It contends, therefore, that its date of filing was within the 90-day period.

[1] Under 43 CFR 3833.1-2(b), the owner of an unpatented mining claim located after October 21, 1976, must file with BLM a copy of the official record of the notice of location within 90 days after the date of location, failing which the claim shall be declared abandoned and void under 43 CFR 3833.4(a). Topaz Beryllium Co. v. United States, Civ. No. 77-0405 (D. Utah 1979) (appeal pending); Carl Dowler, 44 IBLA 192 (1979); M. J. Reeves, 41 IBLA 92 (1979); William E. Rhodes, 38 IBLA 127 (1978); R. Wade Holder, 35 IBLA 169 (1978); and Northwest Citizens for Wilderness Mining Co., Inc., 33 IBLA 317 (1978), *aff'd*, Northwest Citizens for Wilderness Mining, Inc. v. Bureau of Land Management, Civ. No. 78-46-M (D. Mont. June 19, 1979).

[2] The date of location is determined in accordance with the law of the State where the claim is situated. 43 CFR 3833.0-5(h); P & S Mining Co., 45 IBLA 115 (1980). Under the law of the State of California, the date of location is fixed as the date of the posting of the location notice on the claims, and the time for recordation in the county is measured from that date. Cal. Pub. Res. Code §§ 2303, 2313 (1972). In this context we are obliged to note that each of the subject location notices prepared by appellant and recorded in the official records of San Bernardino County expressly declare:

TO WHOM IT MAY CONCERN: Please take notice that:

\* \* \* \* \*

3. The date of this location is the 16 day of September, 1978 on which date the notice of location was posted on the claim. [1/]

[3] Appellant's contention that its own recorded certificates are inaccurate because the declared dates of location are misstated brings this case squarely within the factual situation and argument encountered by this Board in P & S Mining Co., supra. The only difference between that case and this is that in P & S Mining Co. the claimant physically altered the dates of location as shown on the recorded notices of location prior to filing them with BLM. There we held that the revision of these dates did not cure the deficiency, as the controlling date is that which appears on the notice of location as filed in the State's recordation office. Similarly, in Carl Dowler, supra, the claimants had filed a number of location notices with BLM. When BLM personnel pointed out that certain of these showed dates of location more than 90 days prior to their filing, the claimants asked that these be returned, which they were. When they subsequently were re-filed with BLM, the location dates had been changed. This Board affirmed BLM's rejection of these notices.

Where, as here, the locator has indicated a specific date as the date of location and posting on the claims in accordance with State law, and recorded the notices in the official records of San Bernardino County, its failure to file timely with BLM cannot be excused on its present assertion that the information it put to record in the County is untrue. BLM certainly cannot accept for filing and recordation location notices which the locator insists are incorrect on their face.

BLM properly refused to record these notices, the time for filing "correct" notices has long since expired, and the claims must conclusively be deemed abandoned, as required by the statute, supra.

The dissenting opinion notes that 43 CFR 3833.0-5(h) was amended on March 16, 1979, to define "date of location" or "located" as the date determined by State law, rather than "the date indicated on the notice of location," as previously defined by the regulation. We fail to perceive how this change is of any benefit to appellant. As we have already noted, California law establishes the "date of location" as the date the location notice was posted on the claims, and each of the subject location notices specifically declare that copies were posted on the respective claims on the 16th or 17th of September, 1978.

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1/ The notices of location for the White Jubilee Nos. 9, 10, and 11 show location and posting on September 16, 1978. Those for the White Jubilee Nos. 12, 13, 14, and 15 show September 17, 1978.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing  
Administrative Judge

I concur:

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Anne Poindexter Lewis  
Administrative Judge

## ADMINISTRATIVE JUDGE GOSS DISSENTING:

If appellant's allegations are truthful, then the certificate of location as recorded contains an error. The legal effect of the error remains to be determined, but this does not mean we should presume an abandonment of the six mining claims. BLM found that the claims were located on September 16, 1978, based upon the date entered on the filed certificate of location specifying when the claim was located. Because appellant's certificates of location were not filed with BLM until January 11, 1979, more than 90 days after the stated location date, the certificates were returned to appellant.

Lee Resources alleges, on appeal, that the recorded and filed location notices contain typographical errors: "[A]ll location work was done on consecutive days: 14, 15, 16, and 17, October, 1978." The date of its filings would then be within the 90-day period. As the record now stands, there is no unrefuted evidence that the location work, including posting, was done on September 16, 1978.

Prior to the March 16, 1979, amendment, the applicable regulation 43 CFR 3833 (1977) provided in part as follows:

## § 3833.0-5 Definitions.

As used in this Subpart:

\* \* \* \* \*

(h) "Date of location" means the date indicated on the notice of location or discovery posted on an unpatented mining claim \* \* \* under state law \* \* \*. \* \* \* [Emphasis added.]

\* \* \* \* \*

## § 3833.1-2 Manner of recordation -- other Federal lands.

\* \* \* \* \*

(b) The owner of an unpatented mining claim \* \* \* located after October 21, 1976, on Federal land shall file (file shall mean being received and date stamped by the proper BLM office), within 90 days after the date of location of that claim in the proper BLM office a copy of the official record of the notice or certificate of location of the claim or site filed under state law \* \* \*. [Emphasis added.]

As stated, appellant represents that the dates of location were actually October 14 through 17, 1978. California law requires recording of the notice of location and posting of a notice of location or

discovery on the site. 1/ "Date of location" under former regulation 43 CFR 3833.0-5(h) (1977), supra, is "the date indicated in the notice of location" posted on the mining claim. Assuming that the date on the posted notices is the same as on the copies recorded and filed, it would ordinarily have been proper under the 1977 regulations to reject the location notices.

The 1977 regulations, however, have been amended and both the amendment and the reasons therefor should be recognized by the Board. As originally proposed, the amendment would have changed the definition to generally make "date of location" the date shown as the date of location or date of posting on the certificate or notice of location recorded pursuant to state law. 43 FR 15102, 15104 (Apr. 10, 1978).

After comments were received, the approach was changed. The explanation by the Assistant Secretary, Land and Water Resources, and the amendment adopted effective March 16, 1979, are as follows:

A comment on the term "date of location" suggested that the definition make it clear that the date of location is established by State law and not these regulations. The proposed amendment was designed to allow the claimant the broadest possible latitude in recording his claim. It is clear that the proposed amendment creates further problems and we have therefore, adopted the suggested comment and simply state that the "date of location" is that determined

1/ The California Public Resources Code (1972) provides:

"§ 2303. Location of placer claims; manner of location; location by legal subdivision

"The location of a placer claim shall be made in the following manner:

"(a) By erecting at the point of discovery thereon a conspicuous and substantial monument, and by posting in or on the monument, a notice of location, containing the name of the claim, the name, current mailing address or current residence address of the locator or locators, the date of location, which shall be the date of posting such notice, the number of feet or acreage claimed, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim located. [Emphasis added.]

\* \* \* \* \*

"§ 2313. Recording copy of notice and statement of boundary markings; false statement; misdemeanor; penalty

"(a) Within 90 days after the posting of his notice of location upon a lode mining claim, placer claim, tunnel right or location, or millsite claim or location, the locator shall record in the office of the county recorder of the county in which such claim is situated a true copy of the notice."

by the State law in the jurisdiction where the claim is located. [Emphasis added.]

\* \* \* \* \*

§ 3833.0-5 Definitions \* \* \* (h) "Date of location" or "located" means the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated.

44 FR 9720, 9722 (Feb. 14, 1979).

Under California law, the date of location is the date the notice of location was posted on the claim. <sup>2/</sup> If the 1979 regulation applied, and if appellant's location notices were actually posted on the claim within the 90 days prior to filing with BLM, then the notices would not be subject to rejection. <sup>3/</sup> The Board has previously held that where a regulation is amended in a way that benefits a particular class, the Department may, in the absence of intervening rights of third parties or prejudice to the interests of the United States, apply the amendment to pending cases. E.g., Howard S. Bugbee, 29 IBLA 30 (1977); Norman H. Nielson, 72 I.D. 514, 515-16 (1965). In the present case, the record does not show whether there are intervening rights that would be adversely affected by application of the amended regulation to appellant's case.

Under the circumstances, it would be more proper to set aside the decision and remand in order that the State Office may determine whether it would be in the interest of the United States to apply the Bugbee doctrine subject to any intervening rights. If there are not intervening rights and if interests of the United States would not be unduly prejudiced, then the State Office should determine the date of location under California law and apply the 1979 regulation.

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Joseph W. Goss  
Administrative Judge

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<sup>2/</sup> Cal. Pub. Res. Code § 2303 (1972), supra, n.1.

<sup>3/</sup> Under the 1979 regulation, an issue of procedural due process would be present. Neither Congress nor the Department have the authority on the basis of disputed facts, to declare a mining claim void without a hearing. For a recent interpretation of due process, see Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

